NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Aimbridge Employee Service Corporation d/b/a Aloft Chicago O'Hare and UNITE HERE Local 450.

Cases 13-CA-45561 and 13-RC-21849

August 24, 2010

DECISION, CERTIFICATION OF REPRESENTATIVE, AND NOTICE TO SHOW CAUSE

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND HAYES

On January 29, 2010, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 355 NLRB No. 9. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the acting General Counsel filed a cross-application for enforcement. On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, the Board issued an order setting aside the above-referenced decision and order, and retained this case on its docket for further action as appropriate.

The National Labor Relations Board has consolidated these proceedings and delegated its authority in both proceedings to a three-member panel.²

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. The Board's January 29, 2010 decision states that the Respondent is precluded from litigating any representation issues because, in relevant part, they were or could have been litigated in the prior representation proceed-

ing. The prior proceeding, however, was also a twomember decision and we do not give it preclusive effect.

We have considered the preelection representation issues raised by the Respondent, and, except for the Respondent's argument that the two-member Board lacked statutory authority to decide the representation case, we find them without merit. Accordingly, we affirm the decision to deny the request for review in the prior proceeding.

Having resolved the representation issues raised by the Respondent in this proceeding, we next consider the question whether the Board can rely on the results of the election. For the reasons stated below, we find that the election was properly held and the tally of ballots is a reliable expression of the employee's free choice.

As an initial matter, had the Board decided not to issue decisions during the time that the delegee group consisted of two Board members, the Regional Director would have conducted the election as scheduled and impounded the ballots. In this regard, Section 102.67(b) of the Board's Rules and Regulations states:

The Regional Director shall schedule and conduct any election directed by the [Regional Director's] decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director: *Provided, however,* That if a pending request for review has not been ruled upon or has been granted[,] ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision. (Emphasis in original).

See also Casehandling Manual (Representation) Secs. 11274, 11302.1(a) (same). In such a scenario, after resolving the representation issues, we would direct that the impounded ballots be opened and counted.

Thus, it is clear that the decision of the two sitting Board Members to continue to issue decisions did not affect the outcome of the election. With or without a two-member decision on the original request for review, the election would have been conducted as scheduled. This result is required by Section 102.67(b) of the Board's rules, and, under *New Process Steel*, the two sitting Board Members did not have the authority to issue an order directing otherwise. Since the timing of the election was not affected by the issuance of a two-member decision on the request for review, we find that the decision of the Regional Director to open and count the ballots was, at worst, harmless error that did not af-

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

² Consistent with the Board's general practice in cases remanded from the courts of appeals, and for reasons of administrative economy, the panel includes the members who participated in the original decision. Furthermore, under the Board's standard procedures applicable to all cases assigned to a panel, the Board Members not assigned to the panel had the opportunity to participate in the adjudication of this case prior to the issuance of this decision.

fect the tally of ballots. Accordingly, we will rely on the results of the election and issue an appropriate certification.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for UNITE HERE Local 450 and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and part-time housekeeping and laundry employees, including room attendants, laundry attendants, house attendants, overnight house attendant, and housekeeping supervisors employed by the Employer at its facility located at 9700 Balmoral, Rosemont, Illinois; but excluding all other employees, managers, assistant managers, office clerical employees and guards, professional employees and supervisors as defined in the Act.

Notice to Show Cause

As noted above, the Respondent has refused to bargain for the purpose of testing the validity of the certification of representative in the U.S. Courts of Appeals. Although Respondent's legal position may remain unchanged, it is possible that the Respondent has or intends to commence bargaining at this time. It is also possible that other events may have occurred during the pendency

of this litigation that the parties may wish to bring to our attention.

Having duly considered the matter,

- 1. The acting General Counsel is granted leave to amend the complaint on or before September 3, 2010 to conform with the current state of the evidence;
- 2. The Respondent's answer to the amended complaint is due on or before September 17, 2010; and
- 3. NOTICE IS HEREBY GIVEN that cause be shown, in writing, on or before October 8, 2010 (with affidavit of service on the parties to this proceeding), as to why the Board should not grant the acting General Counsel's motion for summary judgment. Any briefs or statements in support of the motion shall be filed by the same date.

Dated, Washington, D.C. August 24, 2010

Wilma B. Liebman,	Chairman
Peter C. Schaumber,	Member
Brian E. Hayes,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD